Supreme Court, U. S.
FILED
JUL 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-1323

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

vs.

KANDYTHE J. LIEPELT, Administratrix of the Estate of Delroy Liepelt, Deceased,
Respondent.

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae.

WYLIE A. AITKEN,
611 Civic Center Drive West,
Santa Ana, Calif. 92701,
(714) 834-1424,

EDWARD I. POLLOCK,
1888 Century Park East, Suite 1520,
Los Angeles, Calif. 90067,
(213) 879-0111,

LEONARD SACKS,
15910 Ventura Boulevard, Suite 801,
Encino, Calif. 91436,
(213) 990-1105,
Attorneys for Amicus Curiae.

(List of Amicus Curiae Continued on Following Page)

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Alabama Trial Lawyers Association
Alaska Trial Lawyers Association
California Trial Lawyers Association
Colorado Trial Lawyers Association
Connecticut Trial Lawyers Association
Delaware Trial Lawyers Association
The Academy of *Florida* Trial Lawyers
Georgia Trial Lawyers Association
Hawaii Trial Lawyers Association
Idaho Trial Lawyers Association
Illinois Trial Lawyers Association
Indiana Trial Lawyers Association
Kansas Trial Lawyers Association
Kentucky Academy of Trial Attorneys
Louisiana Trial Lawyers Association
Maine Trial Lawyers Association
Maryland Trial Lawyers Association
Michigan Trial Lawyers Association
The *Mississippi* Trial Lawyers Association
Missouri Association of Trial Attorneys
Nevada Trial Lawyers Association
New Hampshire Trial Lawyers Association
New Mexico Trial Lawyers Association
New York State Trial Lawyers Association, Inc.
The *Ohio* Academy of Trial Lawyers
Oklahoma Trial Lawyers Association
Oregon Trial Lawyers Association
Pennsylvania Trial Lawyers Association
South Carolina Trial Lawyers Association
Tennessee Trial Lawyers Association
Texas Trial Lawyers Association
Utah Trial Lawyers Association
Association of Plaintiffs' Trial Attorneys
of Metropolitan *Washington, D.C.*
Washington State Trial Lawyers Association
Wisconsin Academy of Trial Lawyers

SUBJECT INDEX

Page

Motion for Leave to File Amicus Curiae Brief 1

Amicus Curiae Brief of Alabama Trial Lawyers Association, Et Al. 4

Introductory Statement 4

Argument 6

I

The Trial of Tort Actions Created by Federal Law Should Not Be Complicated by Permitting the Introduction of the Highly Speculative Evidence of the Supposed Future Tax Impact on Monies the Victim Would Have Earned Had He Been Able to Continue Working. Such a Procedure Represents a Grave Danger of Wreaking Serious Injustice and Hardship on the Victims of Federally Created Torts 6

II

The "Tax" Instruction Should Not Be Given 15

TABLE OF AUTHORITIES CITED

Cases — Page

British Transport Commission v. Gourley, 3 All E. R. 796 (1955) 12

Coleman v. New York City Transit Authority, 332 N.E.2d 850 (New York 1975) 15, 17

Dempsey v. Thompson, 251 S.W.2d 42 (Md. 1952) 10, 14

Eichel v. New York Central, 375 U.S. 253, 84 S. Ct. 316 (1963) 14

Geris v. Burlington Northern, Inc., 561 P.2d 174 (1977) 7, 10, 12

Girard Trust Corn Exchange Bank v. Phila. Trans. Co., 190 A.2d 293 (Pa. 1963) 10

Hall v. Chicago & North Western Ry. Co., 125 N.E. 2d 77 (Ill. 1955) 9, 10

Helfend v. SCRTD, 84 Cal.Rptr. 173, 465 P.2d 61 (Cal. 1970) 12, 13

High v. State Highway Dept., 307 A.2d 799 (Del. 1973) 9, 12

Highshew v. Kushto, 134 N.E.2d 555 (Ind. 1956).. 10

Hinzman v. Palmanteer, 501 P.2d 1228 (Wash. 1972) 10

Hoge v. Anderson, 106 S.E.2d 121 (Va. 1958) 10

Lumber Terminals, Inc. v. Nowakowski, 373 A.2d 282 (Md. App. 1977) 10

Page

Marina Mercante Nicaraguese, S.A., Petn. of, 364 F.2d 118 (2d Cir. 1966), cert. den., 385 U.S. 1005, 87 S.Ct. 710, 386 U.S. 929, 87 S.Ct. 851 .....13, 14

McGee v. Burlington Northern Inc., 571 P.2d 784 (Mont. 1977) 10

Michaud v. Steckino, 390 A.2d 524 (Me. 1978) 16, 17

Missouri-Kansas-Texas R. Co. v. Miller, 486 P.2d 630 (Okla. 1971) 10

Mitchell v. Emblade, 298 P.2d 1034 (Ariz. 1956).. 9

Rediker v. Chicago, Rock Island and P.R. Co., 571 P.2d 70 (Kan. App. 1977) 10

Reeves v. Louisiana & Ark. Rway. Co., 304 So.2d 370 (La. App. 1974) 10, 14

Rodriguez v. McDonnell Douglas Corp., 151 Cal. Rptr. 399 (Cal. App. 1979) 9

Seaboard Coast Line R. Co. v. Thomas, 188 S.E. 2d 891 (Ga. App. 1972) 9

Seely v. McEvers, 564 P.2d 394 (Ariz. App. 1977) 9

Texas & N.O.R. Co. v. Pool, 263 S.W.2d 582 (Tex. Civ. App. 1953) 10

Tipton v. Socony Mobil Oil Co., 375 U.S. 34, 84 S.Ct. 1 (1963) 14

Textbooks	Page
Annotation, 63 A.L.R.2d 1393, 1401	14
"Inflation and The Income Tax," (1977) Brookings Institution Analysis, pp. 153, 154-157, 157-161	6, 7
Note, 69 Harv. L. Rev. 1495, 1496 (1956)	14
Note, 77 Harv. L. Rev. 741, 747 (1964)	14
Quint, "Attorney's Fees—An Item of Damages," 41 L.A. Bar Bulletin 367 (1966)	12
Stoebuck, "Counsel Fees," 38 U. of Colo. L. Rev. 202, 204 (1966)	12

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-1323

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

vs.

KANDYTHE J. LIEPELT, Administratrix of the Estate of Delroy Liepelt, Deceased,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, First District, First Division.

Motion for Leave to File Amicus Curiae Brief.

The undersigned State Trial Lawyers Associations hereby respectfully move this Court for leave to file the attached Amicus Curiae Brief in the instant case. The petitioner has refused to consent to same.

Movants are associations of trial lawyers in the respective states indicated below, and their members are regularly engaged in the trial of tort actions on behalf of tort victims. Movants thus have a vital interest in matters affecting the rights of such victims. Said rights will suffer serious adverse effects if the position of petitioner is adopted by this Court, for the reasons indicated in the attached Amicus Curiae Brief.

Movants' annexed Brief is addressed to the two questions of law at issue herein: (1) whether the loss of earning capacity shall be measured by the gross income of the injured or deceased party, or whether it shall be measured by the supposed net income, arrived at by means of deducting the supposed amount of income taxes that such party would allegedly have been required to pay on his future earnings and (2) whether a jury should be instructed that any award to the plaintiffs in a tort action will not be subject to income tax. We have reviewed the parties' Briefs and do not believe they have adequately presented those facets of these two issues which are discussed in the attached Brief.

If this motion is granted, the attached Brief is respectfully submitted.

Respectfully submitted,

WYLIE A. AITKEN,
EDWARD I. POLLOCK,
LEONARD SACKS,
Attorneys for:
Alabama Trial Lawyers Association
Alaska Trial Lawyers Association
California Trial Lawyers Association
Colorado Trial Lawyers Association
Connecticut Trial Lawyers Association
Delaware Trial Lawyers Association
The Academy of *Florida* Trial Lawyers
Georgia Trial Lawyers Association
Hawaii Trial Lawyers Association
Idaho Trial Lawyers Association
Illinois Trial Lawyers Association
Indiana Trial Lawyers Association
Kansas Trial Lawyers Association

Kentucky Academy of Trial Attorneys
Louisiana Trial Lawyers Association
Maine Trial Lawyers Association
Maryland Trial Lawyers Association
Michigan Trial Lawyers Association
The *Mississippi* Trial Lawyers Association
Missouri Association of Trial Attorneys
Nevada Trial Lawyers Association
New Hampshire Trial Lawyers Association
New Mexico Trial Lawyers Association
New York State Trial Lawyers Association, Inc.
The *Ohio* Academy of Trial Lawyers
Oklahoma Trial Lawyers Association
Oregon Trial Lawyers Association
Pennsylvania Trial Lawyers Association
South Carolina Trial Lawyers Association
Tennessee Trial Lawyers Association
Texas Trial Lawyers Association
Utah Trial Lawyers Association
Association of Plaintiffs' Trial Attorneys
of Metropolitan *Washington, D.C.*
Washington State Trial Lawyers Association
Wisconsin Academy of Trial Lawyers

Amicus Curiae Brief of Alabama Trial Lawyers Association, Et Al.

Introductory Statement.

The basic issue presented in the case at bar has arisen by reason of a maladjustment in our income tax laws. This maladjustment has been created by inflation, which has placed low and moderate incomes within the ambit of our progressive income tax system, although it is manifest that the incomes reached by progressive taxation were far greater in terms of real income at the time the taxation formulae were adopted than they are now, or will be in the future.

The great probability is that this maladjustment will be corrected at some future time. However, in the interim the effect of the rule proposed by petitioner herein will be to permanently impose this maladjustment on claimants in FELA and Jones Act cases, by subjecting them to a reduction of their damages for loss of earning capacity based on the current rates of taxation. (Indeed, perhaps the ultimate irony in this case is that the issue presented herein does not arise in connection with a well-to-do person with an earning capacity that insures him a comfortable excess over his minimum living expenses, but rather arises in connection with an ordinary railroad worker whose income was barely sufficient, considering his family circumstances and obligations.)

It is by reason of considerations such as the foregoing, among many others of similar cogency, that the great majority of state courts that have ruled on the question have refused to permit future loss of earning capacity to be measured on the basis of the

supposed net after taxes (see Point I, *infra*). The rule urged by petitioner herein would thus make the trial of tort actions under federal law appreciably different from the trial of tort actions under the laws of the states. Said rule would also make the trial of tort actions under federal law much more difficult than the trial of tort actions under the majority rule governing state tort actions. It would markedly increase the expenses of trying tort cases governed by federal law. It would also result in victims of torts governed by federal law receiving unequal and discriminatory treatment vis-a-vis victims of torts governed by state law. Such unequal and discriminatory treatment is herein proposed to apply under the FELA and the Jones Act, statutes which have always been held to demonstrate Congressional solicitude for the rights of the injured victims covered thereunder.

We respectfully submit that this Court should not depart from the majority state practice, to the detriment of injured persons whose right of action has been created by Congress, for the reasons we shall now discuss.

ARGUMENT.

I

The Trial of Tort Actions Created by Federal Law Should Not Be Complicated by Permitting the Introduction of the Highly Speculative Evidence of the Supposed Future Tax Impact on Monies the Victim Would Have Earned Had He Been Able to Continue Working. Such a Procedure Represents a Grave Danger of Wreaking Serious Injustice and Hardship on the Victims of Federally-Created Torts.

In the case at bar, there is before this Court the situation of the wrongful death of an ordinary worker, who was employed as a fireman on a freight train at the time of the ill-fated occurrence which gave rise to this lawsuit. He was earning $13,000.00 per year, and had a wife and four children. While the amount of decedent's earnings constituted a considerable sum at the time the applicable income tax percentages were originally enacted, by 1973, the year of his death, inflation had made such earnings commonplace, and decedent was at the low end of the economic scale. Thus, the issue of income tax impact has been placed before this Court in a case involving a person who was not in the financial circumstances envisioned by Congress when the sharply progressive tax rates applicable herein were enacted. See, generally, "Inflation and The Income Tax," (1977) Brookings Institution Analysis, pp. 157-161.

These circumstances constitute the crux of our concern with respect to the issues before this Court. Due to the raging inflation that has plagued us over the past decades, tax rates intended to apply to those

in comfortable circumstances under the system of progressive income taxation are now being imposed on persons whose earnings are barely sufficient for subsistence. (See "Inflation and The Income Tax," op. cit. at pp. 154-157). However, this problem is being recognized and given attention, and numerous proposals are under consideration to "index" tax rates so that they will take account of the fact that inflation has completely distorted the system of progressive taxation. There can be little question but that appreciable relief will be given in this respect in the years to come, although, of course, exactly when and how this relief will be effected cannot be predicted. See, generally, "Inflation and The Income Tax," op. cit., ch. 5, pp. 153, *et seq.*

The result will be that to take into consideration the tax impact based on present tax rates will seriously undercompensate the injured person or his survivors, because such tax rates may become obsolete at any time. This factor was succinctly spelled out by the Oregon Supreme Court in *Geris v. Burlington Northern, Inc.*, 561 P.2d 174 (1977), where the Court said:

> "The computations involved and the various assumptions to be considered are extremely complex. Present progressive tax rates may be projected into the future, but they cannot realistically be applied to future wages which have been projected to rise as a result of inflation without an offsetting computation for the periodic adjustment of exemptions, deductions and income tax brackets *which has historically occurred in response to inflationary trends.*" 561 P.2d at p. 178. Emphasis added.

The effect of considering future taxation is claimed to be appreciable in the case at bar. Plaintiffs' economist testified that, based upon decedent's gross wages, the present cash value of plaintiffs' pecuniary loss was $302,000.00. Under defendant's offer of proof, based on an actuary's estimate of the taxes on decedent's loss of earnings, the present cash value of the pecuniary loss was placed at between $115,325.00 and $138,327.-00. Defendant thus contends that consideration of the income tax impact *would have halved* the amount of pecuniary loss (see, for example, Petitioner's Reply Brief at pp. 4-5. See also Amicus Curiae Brief of National Association of Railroad Trial Counsel at pp. 12-13).

It cannot be seriously contended that such an enormous tax impact will be permitted to remain in the future, on the wages of an ordinary laboring man.[1] To permit personal injury recoveries to be reduced in this fashion, on the basis of the present tax structure, will thus inevitably result in serious injustice and hardship to permanently injured workmen, and to the dependents of deceased workmen.

Considerations such as the foregoing—and a host of others detailed in the other Briefs filed before this Court—have caused a clear majority of the state courts which have passed on this question to reject the proposition that awards should be reduced by the speculative amount of income taxes that the tort victim would have supposedly paid had he continued working. One

[1]Defendant's offer of proof on this subject (see Appendix, pp. 75-76) is not illuminating, but it is, presumably, based on the present tax rate structure.

It is extremely questionable that an actuary is competent to testify with respect to the future tax impact, in any event.

of the most recent cases on the subject is *Rodriguez v. McDonnell Douglas Corp.*, 151 Cal.Rptr. 399 (Cal. App. 1979). After analysis of the authorities, the Court concluded as follows:

> "It is our view that adoption of the rule which would permit the introduction of evidence of future tax consequences to affect the amount of an award in personal injury and wrongful death actions would open the door to *intense speculation* about the future on the part of the jury. The ramifications of such a rule of law could be immense. The less speculation that is involved in the jury's fact-finding process, the more likely will jury awards conform to the standard of fairness and justice between litigating parties. Furthermore, since the aim of the legal rule that would permit a jury to take future tax consequences into account in fixing the amount of an award is to determine the *net* loss to a plaintiff, a logical sequel would mandate that a jury be permitted to know the consequences to the plaintiff of the latter's obligation, customary in personal injury and wrongful death litigation, to pay attorney's fees from the award." 151 Cal.Rptr. at pp. 422-423. Emphasis in original.

Other authorities which have come to the same or similar conclusions include the following: *Seely v. McEvers*, 564 P.2d 394 (Ariz. App. 1977), construing *Mitchell v. Emblade*, 298 P.2d 1034 (Ariz. 1956); *High v. State Highway Dept.*, 307 A.2d 799, 805 (Del. 1973); *Seaboard Coast Line R. Co. v. Thomas*, 188 S.E.2d 891 (Ga. App. 1972); *Hall v. Chicago & North Western Ry. Co.*, 125 N.E.2d 77

(Ill. 1955); *Highshew v. Kushto,* 134 N.E.2d 555 (Ind. 1956); *Rediker v. Chicago, Rock Island and P.R. Co.,* 571 P.2d 70 (Kan. App. 1977); *Reeves v. Louisiana & Ark. Rway. Co.,* 304 So.2d 370, 377 (La. App. 1974); *Lumber Terminals, Inc. v. Nowakowski,* 373 A.2d 282 (Md. App. 1977); *Dempsey v. Thompson,* 251 S.W.2d 42, 45 (Md. 1952); *McGee v. Burlington Northern Inc.,* 571 P.2d 784, 790-791 (Mont. 1977); *Missouri-Kansas-Texas R. Co. v. Miller,* 486 P.2d 630, 636 (Okla. 1971); *Girard Trust Corn Exchange Bank v. Phila. Trans. Co.,* 190 A.2d 293, 297-298 (Pa. 1963); *Texas & N.O.R. Co. v. Pool,* 263 S.W.2d 582 (Tex. Civ. App. 1953); *Hoge v. Anderson,* 106 S.E.2d 121 (Va. 1958); *Hinzman v. Palmanteer,* 501 P.2d 1228 (Wash. 1972).

In *Geris v. Burlington Northern, Inc., supra,* 561 P.2d 174 (1977) the Oregon Supreme Court reviewed the authorities and concluded that at least 29 state courts have considered the question and the "vast majority" hold that evidence of the impact of taxation on plaintiff's damages is not admissible (561 P.2d at p. 177, fn. 4). The Court found that only three state courts (Connecticut, New Jersey and Iowa) have held that such evidence should be considered (*ibid.*). Thus, the rule proposed by petitioner herein would result in a rule in tort actions brought under federal law different from the rule employed by the states, and would obviously afford unequal and discriminatory treatment to plaintiffs in tort actions brought under federal law.

Apart from the factors already mentioned, we view as most grave the effect of the rule proposed by petitioner on the costs of litigation and the trial time

that would be expended in applying such proposed rule. It cannot be applied by merely bringing in the cursory testimony of an actuary, as petitioner's rather insufficient offer of proof seems to suggest (see footnote 1, *supra*). Rather, every trial involving a death or a permanent disability will require the testimony of tax experts to analyze the projections under the circumstances of a particular case. These experts are not inexpensive. They will be involved in all manner of prognostication regarding future tax laws, the impact of changes in circumstances on the supposed future taxes, and many other complex matters involving tax laws. This question alone will engraft an entirely new facet into the trial of personal injury cases, at a considerable expenditure of time and money to the injured plaintiff, as well as the defendants. The increase in trial time for testimony on both sides of this issue is incalculable, but will obviously represent an increased burden on the judicial system. State trial courts—which adjudicate an appreciable percentage of FELA and Jones Act cases—will be required to follow a procedure with respect to assessment of damages which is at a marked variance with the procedure they follow in other tort cases.

Nor do the alleged considerations of fairness so strenuously urged by petitioner dictate that this Court require the foregoing complexities to be engrafted onto all FELA and Jones Act trials involving death or permanent disability. The plaintiffs in such cases will not easily escape taxation, in any event. Save for investments in bonds issued by governmental entities (which are often risky ventures not suitable for the unsophisticated, and which offer low yields by reason of the

favorable tax consequences), we know of no method by which the returns from investment of the proceeds of the tort judgment can escape taxation. Thus, the government will get such share of the judgment as Congress elects to assess at the time the proceeds of the investment are paid. To adopt the rule urged by petitioner would thus impose double taxation on the tort victim. His recovery would be reduced once by a reduction of future loss of earnings to allow for taxation, and it would be reduced again when the income from the invested proceeds of the judgment are taxed. See *Geris v. Burlington Northern, Inc., supra,* 561 P.2d at p. 179; *High v. State Highway Dept., supra,* 307 A.2d at p. 805.

To subject the average railroad worker or seaman to such double taxation is manifestly unfair and unjust.

The genesis of the rule that after-tax income should be the measure of damages is the English case of *British Transport Commission v. Gourley,* 3 All E. R. 796 (1955). Therein, under England's severe tax structure, taxation would have reduced plaintiff's loss of earnings from 37,720 pounds to 6,695 pounds, a reduction of more than 80%. The Court held that the after-tax loss governed.

However, in England the successful plaintiff's attorney's fees are assessed against the defendant. See Stoebuck, "Counsel Fees," 38 U. of Colo. L. Rev. 202, 204 (1966); *Quint,* "Attorney's Fees—An Item of Damages," 41 L.A. Bar Bulletin 367 (1966) and authorities cited at p. 367, fn. 1. Under these circumstances, the hardships on the injured plaintiff are not nearly as serious, and the harsh impact of petitioner's proposed rule is somewhat alleviated. Thus, in *Helfend*

v. SCRTD, 84 Cal.Rptr. 173, 465 P.2d 61 (Cal. 1970), the California Supreme Court reaffirmed the validity of the collateral source rule. One of the rationales for this result was that the collateral source rule "partially serves to compensate for the attorney's share and does not actually render 'double recovery' for the plaintiff" (84 Cal.Rptr. at p. 180.) The Court noted that many of those jurisdictions which had abolished the collateral source rule provided that plaintiff is compensated for his attorney's fees (*ibid.*). The Supreme Court stated that in the absence of a rule providing for such compensation, the collateral source rule was desirable, because it "partially provides a somewhat closer approximation to full compensation for [the plaintiff's] injuries" (84 Cal.Rptr. at p. 181).

The same considerations apply to the issues now before this Court. In *Petn. of Marina Mercante Nicaraguese, S.A.,* 364 F.2d 118 (2d Cir. 1966), cert. den., 385 U.S. 1005, 87 S.Ct. 710, 386 U.S. 929, 87 S.Ct. 851, the Court of Appeals reversed a judgment in which the Trial Court deducted future income taxes from a decedent's estimated annual earnings (which ranged between $9,300 and $11,500, amounts at least equivalent in "real" earnings to the earnings of decedent at bar, a decade later). The Court of Appeals said:

> "in 'the great mass of litigation at the lower or middle reach of income scale, where future income is fairly predictable, added exemptions or deductions drastically affect the tax and * * * *the plaintiff is almost certain to be undercompensated for loss of earning power in any event.' The under compensation would arise from the erosion of the recovery due to the failure to award*

attorneys' fees, almost always high in this type of litigation because of their contingent nature, and continuing inflation." 364 F.2d at p. 125. Emphasis added.

It should also be observed that the present majority rule has been considered by some commentators as akin to the collateral source rule. See, *e.g., Lumber Terminals, Inc. v. Nowakowski, supra,* 373 A.2d 282, 291, fn. 9; *Reeves v. Louisiana and Arkansas R. Co., supra,* 304 So.2d 370, 377; Annotation, 63 A.L.R. 2d 1393, 1401; Note, 77 Harv. L. Rev. 741, 747 (1964); Note, 69 Harv. L. Rev. 1495, 1496 (1956). The vitality of the collateral source rule in FELA and Jones Act cases cannot be doubted. *Eichel v. New York Central,* 375 U.S. 253, 84 S.Ct. 316 (1963); *Tipton v. Socony Mobil Oil Co.,* 375 U.S. 34, 84 S.Ct. 1 (1963).

In sum, the great and overwhelming weight of authority demonstrates that the alleged imposition of taxation should not be considered with respect to those persons protected by the FELA and the Jones Act—average workmen at the middle and lower reaches of the economic scale. The fact that the progressive system of income taxation has not, at this point in time, been adjusted to account for inflation, constitutes no reason at all to penalize FELA and Jones Act claimants who happen to be injured during this doubtless temporary period of maladjustment. To do so would be to subject such claimants to undercompensation, exacerbated by double taxation and serious increases in litigation expenses. These considerations, when coupled with the increased burdens on the court system that would result from such a rule, demonstrate, we respectfully submit, that the rule followed by the great majority

of the state courts is the far sounder rule. We therefore respectfully submit that this Court should rule accordingly.

II

The "Tax" Instruction Should Not Be Given.

Our basic objection to instructing the jury that its damage award is not subject to income taxation is that it carries with it the implication that the plaintiff will receive the award tax-free. In reality, the award is not tax-free, because the investment proceeds of the award are taxable. Moreover, the proposed instruction focuses on one very limited area where the award is not subject to depletion, but ignores the other areas where the award is substantially depleted, by attorneys' fees and other costs necessarily incurred in prosecuting a lawsuit. Thus, the instruction presents a distorted view of the actual situation.

The problem is succinctly set forth in the concurring and dissenting opinion of Chief Judge Breitel in the case of *Coleman v. New York City Transit Authority,* 332 N.E.2d 850 (New York 1975), as follows:

> "The problem is a complicated one and not simply resolved. Apart from the intricacy of the tax laws, *I do not see how or why the tax problem should be separated from those of the different varieties of insurance, including Medicare and Medicaid, and not least of all, by any means, lawyer fees and costs of investigation and experts.* I understand the temptation to treat with the problem but do not believe the time has arrived for its solution or that an acceptable solution has been presented." 332 N.E.2d at pp. 858-859. Emphasis added.

And in *Michaud v. Steckino*, 390 A.2d 524 (Me. 1978), the Court said:

> "Was this . . . requested instruction suggested *for the very purpose of having the jury consider, at least subconsciously, the free tax status of the award of damages* which they were to assess at present value for loss of earning power as reflected through the loss of future earnings which jurors know would have been taxable, if the plaintiff had not been prevented from earning the same by reason of the accident, *in the hope of obtaining a reduced award in the final analysis?*
>
> "We agree, however, that the avowed purpose of such a request is to discourage a jury from enlarging an award, because they may entertain an erroneous belief that the plaintiff will be called upon to pay income taxes thereon.
>
> "It may be conceded that there does exist a possibility of harm if the jury is left uninformed respecting the tax status of the award; on the other hand, *it is conceivable that the plaintiff could be prejudiced if they were told of the tax exemption provision. . . .*
>
> . . .
>
> "If such an instruction as suggested by the defendant were proper, *what objection could there be to a requested instruction informing the jury that the fees of the plaintiff's counsel* (ordinarily not recoverable as damages—see *Gagnon v. Turgeon*, Me., 271 A.2d 634 (1970)) *are not elements of damage*, even though plaintiff will have to pay them out of the award or that the defendant will not be paying the verdict out of his own pocket, since there is insurance coverage.

> These matters are of no concern to the court or jury. Similarly, whether the plaintiff has to pay a tax on the award or not is a matter that concerns only the plaintiff and the government." 390 A.2d at pp. 534-535. Emphasis added.

The rule that an instruction of the type now under discussion need not or may not be given is the rule in the majority of the states (see *Coleman, supra, Michaud, supra*). We respectfully submit that the foregoing considerations demonstrate the soundness of such a rule, and the potential for prejudice and misuse of the rule urged by petitioner.

Respectfully submitted,

WYLIE A. AITKEN,
EDWARD I. POLLOCK,
LEONARD SACKS,
Attorneys for:
Alabama Trial Lawyers Association
Alaska Trial Lawyers Association
California Trial Lawyers Association
Colorado Trial Lawyers Association
Connecticut Trial Lawyers Association
Delaware Trial Lawyers Association
The Academy of *Florida* Trial Lawyers
Georgia Trial Lawyers Association
Hawaii Trial Lawyers Association
Idaho Trial Lawyers Association
Illinois Trial Lawyers Association
Indiana Trial Lawyers Association
Kansas Trial Lawyers Association
Kentucky Academy of Trial Attorneys
Louisiana Trial Lawyers Association
Maine Trial Lawyers Association
Maryland Trial Lawyers Association

Michigan Trial Lawyers Association
The *Mississippi* Trial Lawyers Association
Missouri Association of Trial Attorneys
Nevada Trial Lawyers Association
New Hampshire Trial Lawyers Association
New Mexico Trial Lawyers Association
New York State Trial Lawyers Association, Inc.
The *Ohio* Academy of Trial Lawyers
Oklahoma Trial Lawyers Association
Oregon Trial Lawyers Association
Pennsylvania Trial Lawyers Association
South Carolina Trial Lawyers Association
Tennessee Trial Lawyers Association
Texas Trial Lawyers Association
Utah Trial Lawyers Association
Association of Plaintiffs' Trial Attorneys
of Metropolitan *Washington, D.C.*
Washington State Trial Lawyers Association
Wisconsin Academy of Trial Lawyers